

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ANTHONY WASHINGTON,  
Plaintiff,

v.

CALIFORNIA DEPARTMENT OF  
CORRECTIONS &  
REHABILITATION, et al.,  
Defendants.

Case No. 22-cv-02454 BLF (PR)

**ORDER OF PARTIAL DISMISSAL  
AND OF SERVICE; DIRECTING  
DEFENDANTS TO FILE  
DISPOSITIVE MOTION OR  
NOTICE REGARDING SUCH  
MOTION; DENYING REQUEST  
FOR APPOINTMENT OF  
COUNSEL; INSTRUCTIONS TO  
CLERK**

Plaintiff, a state prisoner, filed a civil rights complaint pursuant to 42 U.S.C. § 1983, against an officer at the Salinas Valley State Prison (“SVSP”) where he was formerly incarcerated, and against the California Department of Corrections and Rehabilitation (“CDCR”), the State of California, and the Correctional Peace Officers Association union (“CPOA”).<sup>1</sup> Dkt. No. 1.

On February 27, 2023, the Court dismissed the amended complaint, Dkt. No. 17,

<sup>1</sup> The matter was transferred to this court from the Eastern District on April 21, 2022, Dkt. No. 5, and originally assigned to the Honorable Magistrate Judge Robert M. Illman, Dkt. No. 6. Judge Illman dismissed the complaint with leave to amend. Dkt. No. 11. The matter was subsequently reassigned to the Undersigned on November 3, 2022. Dkt. No. 19.

1 with leave to amend an equal protection claim. Dkt. No. 20. The time to file a second  
2 amended complaint has passed without a response from Plaintiff. Accordingly, this matter  
3 shall proceed as discussed below.

## 4 5 DISCUSSION

### 6 A. Standard of Review

7 A federal court must conduct a preliminary screening in any case in which a  
8 prisoner seeks redress from a governmental entity or officer or employee of a  
9 governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any  
10 cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim  
11 upon which relief may be granted or seek monetary relief from a defendant who is immune  
12 from such relief. *See id.* § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally  
13 construed. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

14 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential  
15 elements: (1) that a right secured by the Constitution or laws of the United States was  
16 violated, and (2) that the alleged violation was committed by a person acting under the  
17 color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

### 18 B. Plaintiff's Claims

19 The Court found the amended complaint, which was identical to the original  
20 complaint but missing the original page 6, stated a cognizable claim against Defendant Sgt.  
21 Howard based on failure-to-protect. Dkt. No. 20 at 2-3. The Court granted Plaintiff leave  
22 to attempt to state sufficient facts to support an equal protection claim. *Id.* at 3. Plaintiff  
23 was advised that failure to file a second amended complaint in the time provided would  
24 result in the matter proceeding solely on the failure-to-protect claim against Defendant  
25 Howard, and all other claims being dismissed with prejudice for failure to state a claim,  
26 without further notice to Plaintiff. *Id.* at 4-5. Plaintiff has failed to respond. Accordingly,  
27 the Court shall order this matter served on Sgt. Howard, and all other claims shall be

1 dismissed for failure to state a claim for relief.

2  
3 **CONCLUSION**

4 For the reasons state above, the Court orders as follows:

5 1. This action shall proceed solely on the failure-to-protect claim against Sgt.  
6 Howard. Accordingly, all other Defendants and claims are DISMISSED with prejudice for  
7 failure to state a claim for relief. **The Clerk shall terminate all other Defendants from**  
8 **this action.**

9 2. **Defendant Sgt. Howard** shall be served at Salinas Valley State Prison.

10 Service on the listed defendant(s) shall proceed under the California Department of  
11 Corrections and Rehabilitation's (CDCR) e-service program for civil rights cases from  
12 prisoners in CDCR custody. In accordance with the program, the clerk is directed to serve  
13 on CDCR via email the following documents: the operative complaint and any attachments  
14 thereto, Dkt. No. 17, this order of service, and a CDCR Report of E-Service Waiver form.  
15 The clerk also shall serve a copy of this order on the plaintiff.

16 No later than 40 days after service of this order via email on CDCR, CDCR shall  
17 provide the court a completed CDCR Report of E-Service Waiver advising the court which  
18 defendant(s) listed in this order will be waiving service of process without the need for  
19 service by the United States Marshal Service (USMS) and which defendant(s) decline to  
20 waive service or could not be reached. CDCR also shall provide a copy of the CDCR  
21 Report of E-Service Waiver to the California Attorney General's Office which, within 21  
22 days, shall file with the court a waiver of service of process for the defendant(s) who are  
23 waiving service.

24 Upon receipt of the CDCR Report of E-Service Waiver, the clerk shall prepare for  
25 each defendant who has not waived service according to the CDCR Report of E-Service  
26 Waiver a USM-205 Form. The clerk shall provide to the USMS the completed USM-205  
27 forms and copies of this order, the summons and the operative complaint for service upon  
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1 each defendant who has not waived service. The clerk also shall provide to the USMS a  
2 copy of the CDCR Report of E-Service Waiver.

3 3. No later than **ninety-one (91) days** from the date this order is filed,  
4 Defendants shall file a motion for summary judgment or other dispositive motion with  
5 respect to the claims in the complaint found to be cognizable above.

6 a. Any motion for summary judgment shall be supported by adequate  
7 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of  
8 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor  
9 qualified immunity found, if material facts are in dispute. If any Defendant is of the  
10 opinion that this case cannot be resolved by summary judgment, he shall so inform the  
11 Court prior to the date the summary judgment motion is due.

12 b. **In the event Defendants file a motion for summary judgment, the**  
13 **Ninth Circuit has held that Plaintiff must be concurrently provided the appropriate**  
14 **warnings under *Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See**  
15 ***Woods v. Carey*, 684 F.3d 934, 940 (9th Cir. 2012).**

16 4. Plaintiff's opposition to the dispositive motion shall be filed with the Court  
17 and served on Defendants no later than **twenty-eight (28) days** from the date Defendants'  
18 motion is filed.

19 Plaintiff is also advised to read Rule 56 of the Federal Rules of Civil Procedure and  
20 *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (holding party opposing summary judgment  
21 must come forward with evidence showing triable issues of material fact on every essential  
22 element of his claim). Plaintiff is cautioned that failure to file an opposition to  
23 Defendants' motion for summary judgment may be deemed to be a consent by Plaintiff to  
24 the granting of the motion, and granting of judgment against Plaintiff without a trial. See  
25 *Ghazali v. Moran*, 46 F.3d 52, 53–54 (9th Cir. 1995) (per curiam); *Brydges v. Lewis*, 18  
26 F.3d 651, 653 (9th Cir. 1994).

27 5. Defendants shall file a reply brief no later than **fourteen (14) days** after  
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1 Plaintiff's opposition is filed.

2 6. The motion shall be deemed submitted as of the date the reply brief is due.  
3 No hearing will be held on the motion unless the Court so orders at a later date.

4 7. All communications by the Plaintiff with the Court must be served on  
5 Defendants, or Defendants' counsel once counsel has been designated, by mailing a true  
6 copy of the document to Defendants or Defendants' counsel.

7 8. Discovery may be taken in accordance with the Federal Rules of Civil  
8 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local  
9 Rule 16-1 is required before the parties may conduct discovery.

10 9. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the  
11 court informed of any change of address and must comply with the court's orders in a  
12 timely fashion. Failure to do so may result in the dismissal of this action for failure to  
13 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

14 10. Extensions of time must be filed no later than the deadline sought to be  
15 extended and must be accompanied by a showing of good cause.

16 **IT IS SO ORDERED.**

17 **Dated: \_\_April 14, 2023\_\_**

  
18 BETH LABSON FREEMAN  
19 United States District Judge  
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25 Order of Svc  
26 PRO-SE\BLF\CR.22\02454Washington\_svc  
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